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No. 95-358

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

GENE E. RICE, et al.,
Petitioner,

v.

THE RESOLUTION TRUST CORPORATION, et al.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Ninth Circuit's decision, affirming the district court's order barring indemnity and contribution claims against a non-party to the action, an unwarranted extension of judicial power?

2. Does the Ninth Circuit's decision affirming the district court's approval of a partial settlement impose a penalty against nonsettling defendants without due process of law and in violation of federal statute?

3. Does the Ninth Circuit's decision conflict with this Court's decision in *O'Melveny & Meyers v. FDIC*, 114 U.S. 2048, 129 L.Ed.2d 67 (1994), because the Ninth Circuit disregarded Arizona law of indemnity in the context of state law claims against the nonsettling defendants by the Resolution Trust Corporation?

LIST OF PARTIES

The parties to the proceedings below were Defendants/Petitioners Gene E. Rice, Lola Rice, Ernest F. Modzelewski and Nancy Modzelewski ("Nonsettling Defendants") and Plaintiff/Respondent Resolution Trust Corporation ("RTC") in its corporate capacity.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Gene E. Rice, Lola Rice, Ernest F. Modzelewski and Nancy Modzelewski respectfully request that this Court issue a writ of certiorari reviewing the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on June 5, 1995.

OPINIONS BELOW

The United States District Court for the District of Arizona issued an Order, dated January 7, 1994, containing findings of fact and conclusions of law, included as Appendix "A", *infra*.

The March 23, 1995, Opinion of the United States Court of Appeals for the Ninth Circuit, affirming the district court's Order, is reported at 51 F.3d 194, and included as Appendix "B", *infra*.

The June 5, 1995, Order of the United States Court of Appeals for the Ninth Circuit, denying petitioners' petition for rehearing, has not been reported. A copy of the Order is included as Appendix "C", *infra*.

JURISDICTION

Petitioners Gene Rice, Lola Rice, Ernest Modzelewski and Nancy Modzelewski challenge the district court's approval of the partial settlement of a Resolution Trust Corporation ("RTC") lawsuit ("the RTC action") against former directors and officers of MeraBank, a failed federal savings bank. As the district court found, the partial settlement of the RTC action was inextricable from (and consolidated with) the settlement of three other related actions (collectively referred to as the "consolidated actions") (Appellant's Excerpts of Record (hereinafter "R.") at 721, 1703.) Therefore, the appeal below sought reversal of the judgments dismissing each of the following actions: Resolution Trust Corporation v. Rice, et al., CIV 91-0634 PHX PAR; Stepack, et al., v. Turley, et al., CIV 89-2061 PHX PAR; Persky et al., v. Turley, et al., CIV 88-1830 PHX PAR; and Gould, et al., v. Turley, et al., CIV 88-2089 PHX PAR.

Subject matter jurisdiction is asserted (i) pursuant to 28 U.S.C. Sections 1331(a) and 1345, and 12 U.S.C. Section 1441(a)(1)), in RTC v. Rice; (ii) pursuant to 28 U.S.C. Sections 1331 and 1332 in Stepack v. Turley; and (iii) pursuant to Section 22 of the Securities Act of 1933 ("Securities Act") and Section 27 of the Securities Exchange Act of 1934 ("Exchange Act") in Persky v. Turley.

Judgments were appealed to the United States Court of Appeals for the Ninth Circuit pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. The judgments appealed from were entered on or about December 30, 1993; the notice of appeal was filed on January 31, 1994, and was timely pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure.

The Ninth Circuit affirmed the District Court of Arizona in a March 23, 1995, opinion. Petitioners then petitioned the Ninth Circuit for a rehearing. On June 5, 1995, the Ninth Circuit denied petitioners' petition for a rehearing. The Court has jurisdiction to review the Ninth Circuit's judgment under 28 U.S.C. section 1254.

STATEMENT OF THE CASE

From 1954 until February 1990, Gene Rice was employed by MeraBank, a federal savings bank. (R. at 766.)[1] Mr. Rice devoted over thirty-five (35) years to serving MeraBank, including twenty-eight (28) years as a director and officer. During his tenure as an officer and director, Mr. Rice served as MeraBank's Chairman and Chief Executive Officer for eight (8) years. From 1961 until February 1990, Ernest Modzelewski devoted over twenty-eight (28) years to serving MeraBank, including 17 years as an officer and eight years as director. (R. at 775.) To retain Mr. Rice and Mr. Modzelewski as well as recognize their years of devoted service to MeraBank, MeraBank provided Mr. Rice and Mr. Modzelewski with salary continuation agreements providing pension benefits. As of February 1990, Mr. Rice's pension benefits were $4,210,880; Mr. Modzelewski's were approximately $2 million. (R. at 744, 775.)

In December 1986, AZP Group, Inc., which later became Pinnacle West Capital Corporation ("Pinnacle West"), acquired MeraBank. As a condition of Pinnacle West's acquisition, the Federal Home Loan Bank Board required Pinnacle West to enter a "keep well agreement" obligating

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[1]MeraBank has also previously been known as First Federal Savings Bank of Arizona and First Federal Savings and Loan Association. (EOR,766.)

Pinnacle West to maintain minimum levels of capital at MeraBank. (R. at 795-96.) In December 1989, however, Pinnacle West secretly entered into an agreement with the Office of Thrift Supervision ("OTS") wherein Pinnacle West agreed to pay $465.5 million to MeraBank for a release from the "keep well agreement." ("1989 Pinnacle West OTS Agreement"). (R. at 1611-21.) Almost immediately after Pinnacle West was released from the "keep well agreement," the government seized MeraBank and repudiated Mr. Rice and Mr. Modzelewski's pension benefits. (R. at 769.)

The Persky and Gould class actions were filed in late 1988, eventually were consolidated and involved classes of persons who purchased Pinnacle West's common stock. (R. at 365-66.) The Stepack action was filed as a derivative action in late 1989, and alleged claims for negligence, breach of fiduciary duty and Securities Act violations in connection with Pinnacle West's acquisition of MeraBank in December 1986. (R. at 367-369.)[2] Following orders on motions to dismiss, the consolidated class actions consisted of claims for negligent misrepresentation and violations of the Securities Act, the Exchange Act and the Arizona Sale of Securities Act in connection with defendants'

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[2]Mr. Rice was a defendant in all the actions. Pinnacle West was a defendant in the consolidated Perskey and Gould class actions, and a nominal defendant in the Stepak action. Mr. Modzelewski was not a defendant in any of the actions.

purported misrepresentations about Pinnacle West. (Id.) The parties conducted substantial discovery in the class and derivative actions. (R. at 367,369.)

The RTC action was filed in April 1991, alleging claims for negligence, gross negligence, negligence per se, breach of fiduciary duty and breach of contract against 20 former MeraBank directors and officers, including Mr. Rice and Mr. Modzelewski. (R. at 372.) Although Pinnacle West was not named as a defendant, the RTC consistently has maintained that it had claims for compensatory damages against Pinnacle Wes. Nevertheless, the RTC and Pinnacle West entered into a tolling agreement suspending the running of the statute of limitations. (R. at 372,1704,1711.) These two actions settled before Pinnacle West became a defendant in the RTC action. (R. at 171.)

Defendants filed motions to dismiss the RTC action in July 1991, and after hearing oral argument in September 1991, the district court stayed the action pending settlement proceedings. (R. at 373.) No discovery was conducted in the RTC action prior to the disputed settlement.

By a district court order dated January 30, 1992, the Honorable Pamela Ann Rymer, United States Court of Appeals Judge, was appointed Settlement Judge. (See R. at 1698.) During the ensuing court supervised settlement negotiations, the RTC told Mr. Rice and Mr. Modzelewski (the "nonsettling RTC

defendants") that if they wanted to settle the RTC action, they would have to completely forfeit their pension benefit claims ("compensation claims").

In order to further the settlement, the excess insurers for all the defendants, including Mr. Rice and Mr. Modzelewski, offered to pay Mr. Rice and Mr. Modzelewski's compensation claims above and beyond the amount paid out in the settlement. However, the district court found that "[t]he RTC was unwilling to accept settlement on these terms." (R. at 1705 ¶ 15.) No legitimate governmental interest has ever been offered to explain the RTC's conduct.

The RTC's agenda was to require the nonsettling RTC defendants to give up far more than the other similarly situated settling defendants. Six other defendants also asserted compensation claims in the aggregate amount of $1.914 million against the RTC for wrongful repudiation of their respective directors' fees (identified in the Stipulation as "compensation claims"). These settling defendants compromised their lesser claims as a condition of settlement.[3] (R. at 1703.) The

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[3] The settling defendants' respective compensation claims were substantially less valuable individually, as follows: Peter C. Byrne $217,500 (EOR,654-58); Reginald T. Morrison, $180,00 (Id.,662-66); Donald S. Johnson, $225,000 (Id.,670-74); Howard E. Kraft, $391,500 (Id.,649-53); Hayden C. Hayden, $652,500 (Id.,678-82); and Melvin Decker, $247,500 (Id.,694-98).

practical effect, however, was that the RTC's settlement terms disparately prejudiced the nonsettling RTC defendants because no other settling defendant had claims remotely approaching the value of the nonsettling RTC defendants' compensation claims nor did they have any entity offering to fund payment of their claims in addition funding the settlement of this action.

The RTC's refusal to allow the excess insurers to pay the non-settling defendants' compensation claims places the Nonsettling RTC defendants and their insurers in an even more adverse relationship. The district court noted below that

> both the RTC and Nonsettling RTC defendants maintain that substantial coverage exists with respect to the RTC claims; the insurers, of course disagree.

(R. at 1705 ¶ 16.) The RTC's only response to this heightened conflict between the Nonsettling RTC defendants and their insurers was:

> the possible exhaustion of defense coverage limits under applicable insurance policies is a risk inherent in litigation against which the Non-Settling RTC Defendants cannot reasonably expect special protection.

(Dec. 20, 1993, Joint Reply at 10 n.6.)

Just as the nonsettling RTC defendants objected to the RTC's arbitrary repudiation of their compensation rights in

Modzelewski v. RTC, 14 F.3d 1374 (9th Cir. 1994),[4] so too did they object to being singled out and pressured to sacrifice what no one else had to sacrifice in settlement-- a bona fide offer of payment, which cost the RTC and the other settling parties absolutely nothing. The result, however, was that all other parties settled out of the RTC action. More particularly, the settling parties executed a Stipulation of Settlement in November 1993 ("Stipulation") for the dismissal of the consolidated actions, except as to the nonsettling RTC defendants. (R. at 347-637.)

The Stipulation required a motion for entry of findings of fact, conclusions of law, order and final judgment. (R. at 412.) Following written briefing, a joint motion for an order determining the parties' settlement to be in good faith and dismissing all claims against certain parties ("motion for good faith determination") was heard by Judge Rymer on December 29, 1993. The nonsettling RTC defendants opposed the good faith determination on several grounds, including those issues identified herein.

In an unprecedented expansion of judicial power, the district court barred all the nonsettling RTC defendants' contribution and indemnity actions against Pinnacle West, which

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[4]In Modzelewski v. RTC, the Ninth Circuit found that Mr. Rice's pension benefits were vested, but Mr. Modzelewski's were not. 14 F.3d 1374 (9th Cir. 1994).

was not even a defendant in the RTC action, and barred all non statutory or non contractual indemnity claims against the settling defendants who were parties to the RTC action. (R. at 1711.).

As articulated in the district court's January 11, 1994, Order ("Settlement Order") setting forth findings of fact and conclusions of law, the district court found that the Stipulation was non-collusive and was a fair, reasonable and good faith resolution of the RTC action. (R. at 1702, 1708.) The Settlement Order also barred the nonsettling RTC defendants' claims for contribution and indemnity against non-party Pinnacle West. (R. at 1711.) The findings of fact stated that Pinnacle West contributed to the settlement by "funding the premium expense for the various directors' and officers' liability insurance policies," and that Pinnacle West contributed $5.75 million to the settlement.[5] (R. at 1703-04.) The findings of

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[5] As stated in the Affidavit of Katherine C. Harmeyer (EOR,724-25), the Stipulation provided for payment in the aggregate amount of $61.625 million in full settlement of the Class Action and the Derivative Action and in partial settlement of the RTC action. Pinnacle West paid $5.75 million to the Class Settlement Fund. Directors and officers' liability insurance companies paid $55.875 million of the balance of the settlement funds, of which $28.25 million dollars was deposited in the Class Settlement Fund and $27.625 million was deposited in the Derivative Settlement Fund. The Stipulation further provided that the RTC was to receive $25 million of the Derivative Settlement Fund.

fact added, without more, that the district court "considered" the 1990 Pinnacle West OTS Agreement. (R. at 1703.)

Finally, the district court adopted Arizona's proportionate judgment rule as the proper post judgment offset rule. (R. at 1714.) The district court and many of, if not all, the settling parties believed that the settlement of the RTC action was inextricably inter-related with the settlement of the Class action and Derivative action settlements.

The Ninth Circuit affirmed the judgment on March 23, 1995. The court found nothing in the record to indicate that the trial court abused its discretion in finding that the settlement agreement was fair, made in good faith, and did not prejudice the Nonsettling Defendants. On May 7, 1995, Petitioners filed their Petition for Rehearing. On June 5, 1995, the Ninth Circuit denied the Petition for Rehearing. Petitioners now seek a writ of certiorari reviewing the Ninth Circuit's judgment and opinion.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT'S ORDER BARRING THE NONSETTLING DEFENDANTS' INDEMNITY AND CONTRIBUTION CLAIMS AGAINST A NON-PARTY WAS AN UNWARRANTED EXTENSION OF JUDICIAL POWER; THE NINTH CIRCUIT'S AFFIRMANCE OF THAT ORDER CONFLICTS WITH THE TENTH CIRCUIT.

The District Court was without authority to bar the non-settling defendants' indemnity and contribution claims against Pinnacle West, a non-party, to the RTC action. Despite the well settled principles laid by this Court, the Ninth and Tenth Circuit disagree about this fundamental issue of judicial power. It cannot be disputed that a federal court's jurisdiction is limited and there is a presumption against federal jurisdiction to enforce a settlement agreement.

> Federal courts are courts of limited jurisdiction. They possess only power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.

Kokkonen v. Guardian Life Ins. Co. of America, 114 S.Ct. 1673, 1675, 120 L.Ed.2d 391 (1994) (reversing Ninth Circuit decision that district court had power to enforce settlement agreement between parties to litigation where settlement agreement did not reserve such power to district court) (citations omitted).

> Enforcement of the settlement agreement . . . whether through award of damages or decree of specific performance, is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction.

Id. at 1675-76.

Where a court shields a non-party from claims by a non-settling defendant, the Court must have a clear basis for jurisdiction. There simply is no such jurisdiction here. Normally, "[c]ontribution bar orders are frequently upheld when they are sought by a settling defendant against a nonsettling defendant in the same case." FDIC v. Geldermann, 975 F.2d 695, 698 (10th Cir. 1992). However, the Court lacks jurisdiction to provide a bar order to a non-party.

In reversing a district court's confirmation of a settlement barring indemnity and contribution claims against non-parties, the Tenth Circuit in Geldermann wrote about the dangers of non-party bar orders:

> However, it is quite another matter when the bar order precludes a nonsettling defendant from maintaining a claim of contribution or indemnity against non-parties. The nonsettling defendant has nothing to win and everything to lose when the Court considers such a bar order. If the Court decides that the nonsettling defendant is entitled to assert a claim of contribution or indemnity against the non-parties, that determination would not bind the non-parties. On the other hand, the bar order precluding the nonsettling defendant from suing the nonparties for indemnification or contribution would bind the nonsettling defendant. Any claims for contribution or indemnity that may be asserted by the [non-settling] defendants in the Instant Action against the Settlors must be adjudicated between--not through the FDIC. Contribution and indemnity claims may involve consideration of may matters, such as personal defenses, compulsory counterclaims, and the like, which could not be asserted by or against the FDIC.

Id. (citation omitted).

Here, despite the non-settling defendants objections to the settlement based upon Pinnacle West, as a non-party, receiving the benefit of a bar order, the district court found that

> Pinnacle West is a critical party to the overall settlement of the consolidated actions. Moreover, Pinnacle West has contributed substantial value to the overall settlement, without which the partial settlement in the RTC Action could not have occurred. Under these circumstances I conclude that the bar order should also apply to any subsequent claims against Pinnacle West.

(Settlement Order, App. A at A34-A35.)

The Ninth Circuit without analysis, without mentioning, and in conflict with Geldermann, adopted the district court's rationale holding:

> The district court did not abuse its discretion in finding nonparty Pinnacle West to be a critical participant and contributor to the overall settlement, and thereby applying the bar order to subsequent non-contractual claims against it.

(Opinion, App. B at B17-B18.)

However, where the government has not even been required to bring Pinnacle West into the litigation and state the

nature of its claims, the settlement process is ripe for abuse. As the Geldermann Court noted:

> It does not take too much imagination to see why the FDIC in the Settlement Agreement desired to negotiate away the [non-settling] Defendants' possible right to claim contribution or indemnity from the Settlors. The FDIC obviously could enhance the attractiveness of the settlement to the Settlors if it were able to bargain away not only its claims against the Settlors, but also the claims that other entities (including entities that are not even part of the Sevier or FIS suits) might have against the Settlors.

Geldermann, 975 F.2d at 698.

All that is required to provide the district court with jurisdiction and the non-settling defendants a real opportunity to challenge the settlement is the RTC filing a claim against Pinnacle West. Rather than even determine the nature of its claims and file against Pinnacle West, the RTC entered a tolling agreement and conducted no discovery. (R. at 1704.) In fact, the RTC even admitted:

> [T]he RTC's claims have not progress beyond an early stage . . . For example, it is too early to determine what claims will ultimately be

> presented to the jury at trial much less the nature of those claims.

(RTC's Dec. 20, 1993 Reply, at 22.)

Finally, the Stipulation provided that Pinnacle West was to contribute $5.75 million to the Class Settlement Fund but nothing to the RTC. (R. at 724.) Thus, the RTC government secretly tried its own claims and the claims of the non-settlors against Pinnacle West and convinced the Court to reach matters not properly before it.

The district court distinguished Geldermann on the ground that the FDIC was not the real party in interest to request the bar order and Rule 17 of the Federal Rules of Civil Procedure prevented the Court from addressing its request. (R. at 697.) In contrast, the district court considered that Pinnacle West was fully involved in seeking a bar order for itself. (See R. at 1711.) However, being involved in settlement discussions with a settlement judge is a far cry from being a named party in the litigation. Non-settling defendants are not aware of any case other than the present action where involvement in settlement discussions, without being a party to a legal action, constituted a basis for federal court jurisdiction.

Finally, the conclusion that the consideration provided by Pinnacle West conferred a substantial benefit on the RTC, justifying the bar order is unsupportable and is not recognized

basis for jurisdiction. (See App. A at A28-A29.)[6] When a nonparty is permitted to participate in settlement, and thereby purchases a bar order protecting itself from ever having to answer to nonsettlors, the jurisdiction of the federal courts is expanded beyond any justifiable limit.

II. THE NINTH CIRCUIT AFFIRMED A PARTIAL SETTLEMENT WHICH IMPOSES A PENALTY AGAINST THE NONSETTLING DEFENDANTS WITHOUT DUE PROCESS OF LAW AND IN VIOLATION OF FIRREA.

The statutory framework of FIRREA (12 U.S.C. 1801 et seq.), in which the RTC is mandated to conduct itself, is far reaching in certain aspects. Nevertheless, basic concepts of due process and constitutionally protected rights were not abolished with FIRREA and necessarily must circumscribe the RTC's reach.

The district court's approval of a settlement barring claims against a non-party, especially when the claims against the non-party are not disclosed violates due process. See Geldermann, 675 F.2d at 698 n.4. ("we note that courts faced with the reverse of our situation have uniformly prohibited

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[6]The District Court did not find that the 1990 Pinnacle West-OTS payment "contributed the settlement" in its findings of fact. (Settlement Order, App. A at A17-A19.)

parties from seeking to preclude the rights of non-parties. See e.g. Martin v. Wilkes, 490 U.S. 755, 768, 109 S.Ct. 2180, 2187 (1989); Hansberry v. Lee, 311 U.S., 32, 41, 61 S.Ct. 115. 118, 85 L.Ed. 22 (1940)"). While the Geldermann court distinguished between the imposition of a detriment on non-parties, and the receipt of a beneficial bar order by a non-party, the due process clause makes no such distinction.

> A voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly "settle," voluntarily or otherwise, the conflicting claims of another group of employees who do not join the agreement. . . . "[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party . . . without that party's agreement."

Martin 490 U.S. at 768, 109 S.Ct. at 2188, *quoting* Firefighters v. Cleveland, 478 U.S. 501, 529, 106 S.Ct. 3063, 3079 (1986). Thus, it is clear that whether or not the court is bestowing a benefit or imposing a detriment on non-parties, as a matter of due process the court cannot adjudicate the rights of entities whose claims are not before the court.

However, Mr. Rice and Mr. Modzelewski were not deprived of their due process rights solely by a lack of adequate procedure. They were penalized by the RTC. By requiring Mr. Rice to give up his vested right to his $4.2 million pension from

MeraBank, which was confirmed in Modzelewski, -- a wholly separate lawsuit against the RTC -- the RTC secured a penalty against both Mr. Rice and Mr. Modzelewski. By imposing the requirement on Mr. Rice and Mr. Modzelewski that they forfeit their vested rights and not accept payment from their excess insurer in order to participate in the settlement of the RTC action, the RTC in effect, is imposing an extremely severe penalty without ever having made a showing of wrongdoing.

Equally, by imposing the disparate settlement terms, the RTC singled out each of the non-settling RTC defendants for punitive treatment without any showing whatsoever that they were guilty of malfeasance. All that the RTC did is initiate the RTC action, merely alleging mismanagement claims. No discovery was conducted and no evidence of wrongdoing was presented. Yet, even in the utter absence of a showing of wrongdoing, or a likelihood that the RTC will prevail on the merits, the nonsettling RTC defendants were penalized by the Stipulation.

If the RTC wants to impose a penalty on the defendants in the RTC action, or to obtain an injunction or attachment order against them, the Stipulation simply is not the available methods by which it may do so. FIRREA contains very restrictive mechanisms for the issuance of an injunction, an attachment order or the imposition of penalties requiring strict compliance by the RTC with statutory provisions and due

process considerations. See 12 U.S.C. section 1833a (including certain penalty provisions of the Crime Control Act of 1990), 12 U.S.C. section 1818 (suspension, injunction, and penalty provisions) and 12 U.S.C. section 1821 (prejudgment attachment and injunction provisions).[7] See also Manges v. Camp, 474 F.2d 97, 100, n.3 (5th Cir. 1973) (former section 1818 penalty sought, quoting Justice Frankfurter, "Where tangible property is taken, either directly or indirectly, there is no doubt that the opportunity for hearing must exist").

Because the condition requiring Mr. Rice to give up his entitlement to $4.2 million owed by the RTC in order to participate in the Stipulation is unquestionably punitive, the RTC is bound by due process to afford Mr. Rice certain safeguards under sections 1818, 1821 and 1833 before effecting such a penalty. Parker v. Ryan, 760 F. Supp. 1189, 1191 (N.D. Miss. 1991)(OTS required to demonstrate prima facie case before attachment order will issue); 136 Cong. Rec. E3686 (daily ed. Nov. 2, 1990) (Congress intended that the government be required to make a showing of injury prior to obtaining injunctive relief).

Courts have long required strict compliance with due process considerations by the government in carrying out its

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[7] See, eg., section 1818(e) through (l); section 1821(d)(18) and (19); and section 1833a, copies of which are provided in the Addendum hereto.

statutory responsibilities. The Supreme Court in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493 (1985) considered whether a local school district, in dismissing a school security guard, violated the guard's due process rights to a hearing and opportunity to challenge the evidence against him. The Court ruled that the dismissal without an administrative hearing and the district's dismissal was unconstitutional. The Court stated that

> The constitutional process due in any particular situation cannot be exercised at the choice of the government. The process due is a matter of federal constitutional law, and cannot be diminished by the fact a statute sets forth its own procedures that it deems adequate for determining the preconditions to adverse action.

(470 U.S. at 541.)

Further, where the imposition of severe penalties (such as the forfeiture of property) is attempted by a governmental entity (such as the RTC), all the protections afforded by the Fifth and Sixth Amendments, including notice, confrontation, jury trial, the requirement of proof beyond a reasonable doubt and compulsory process, may be required. United States v. Ward, 448 U.S. 242, 249, 100 S.Ct. 2636, 2641 (1980) (imposition of civil penalty for oil discharge into navigable waters evaluated for severity to determine whether Fifth and

Sixth Amendment protections invoked); United States v. United States Coin and Currency, 401 U.S. 715, 720, 91 S.Ct. 1041, 1044 (1971)(forfeiture of property penalty invokes Constitutional protections of the Fifth Amendment); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 167, 83 S.Ct. 554, 567 (1963)(penalty of forfeiture of citizenship requires Fifth and Sixth Amendment protections); Villa, John K., Bank Directors' Officers' and Lawyers' Civil Liabilities 1-105 (1992).

As a matter of law, the district court was required to disapprove the Stipulation on constitutional grounds because the RTC's imposition of the compensation claim waiver condition on the nonsettling RTC defendants constituted a penalty assessed without due process of law. The imposition of the disparate settlement terms by the RTC, as approved by the district court and affirmed by the Ninth Circuit, was without any evidentiary showing by the RTC that the nonsettling RTC defendants had engaged in any wrongdoing and without any finding that they were subject to the penalty of having to waive valid compensation rights adjudicated in a wholly separate lawsuit. For these reasons, the Stipulation should be reversed as to the penalty provisions requiring a waiver of compensation claims, and the nonsettling RTC defendants should be allowed to participate in the Settlement without being subject to the disparate conditions previously imposed.

III. THE NINTH CIRCUIT'S OPINION CREATES A FEDERAL "COMMON LAW" RULE OF DECISION IN CONTRAVENTION OF SUPREME COURT PRECEDENT.

In deciding to eliminate the nonsettling RTC defendants' common law right to obtain complete reimbursement of any compensatory damages they are forced to pay, i.e. indemnity, the district court improperly federalized Arizona common law on indemnity and found that no such rights exist. As district Judge Lambeth observed

> [T]he inquiry as to whether indemnity claims may be barred must be somewhat more stringent than that for contribution claims. Extinguishing a right of indemnity would give a great benefit to the settling tortfeasor, who might have been liable not only for its own share of the liability, but also might have been required to reimburse other defendants. Unless the Court, in its fairness inquiry, finds there are no indemnity claims, or that the only indemnity claims are in the nature of contribution, a bar against the indemnity claims seems inappropriate. (Footnoted omitted.) At least one Court of Appeals has found that rights of indemnity

> cannot be extinguished. See Donovan v. Robbins, 752 F.2d 1170 (7th Cir. 1984).
>
> Although the court does not necessarily espouse the 7th Circuit's per se rule, the court is not at this time prepared to accept a blanket ban on indemnity claims. The majority of courts considering the issue have rejected indemnity in the federal securities law context, the plaintiffs are also seeking common law relief under D.C. law.

In re NBW Commercial Paper Litigation, 807 F.Supp. 801, 811 (D.D.C. 1992).

The Ninth Circuit responded to this argument by citing a federal securities case that found "not a shred of logic upon which we could base a principled distinction between bar orders against contribution, on the one hand and orders against indemnity . . . on the other[.]" **(Opinion, App. B at B18-B19 (quoting In re U.S. Oil & Gas Litig., 967 F.2d 489, 495 (4th Cir. 1992)).)** Yet, this Court recently ruled, "[t]here is no Federal general common law" in the context of RTC actions like RTC v. Rice. O'Melveny & Myers v. FDIC, 114 U.S. 2048, 129 L.Ed.2d 67 (1994). Here, the RTC action is limited to common law relief. Here, as in Donovan v. Robbins, the record lacks any support for the principle that a settlement should interfere with the rights of tortfeasors to "concentrate the

whole deterrent effect of the judgment on that other person [settling defendants] if possible." 752 F.2d at 1178.

Moreover, the district court did not find that there were no indemnity claims. Instead, the district court relied on authority barring indemnity claims under federal law -- the Securities Act of 1933 and Securities Exchange Act of 1934, and claims based upon comparative indemnity to bar nonsettling defendants' state law based claims. In essence, the district court looked to federal law rather than the law of Arizona to analyze the validity of the nonsettling defendants indemnity and contribution claims.

Under such circumstances, the Ninth Circuit's position conflicts with a very recent holding of the First Circuit. The First Circuit reversed and remanded a summary judgment where the district court failed to discuss the asserted distinctions between the duty to indemnify and claims of contribution under state law. In re San Juan Dupont Plaza Hotel Fire Litigation, 45 F.3d 564, 568 (1st Cir. 1995). Thus, the settlement should be reversed with directions that the district court evaluate the non-settlors indemnity and contribution rights under Arizona law.

CONCLUSION

In light of the above, petitioners respectfully request that this Court issue a writ of certiorari reviewing the Ninth Circuit's judgment and decision.

DATED: August 28, 1995

Respectfully submitted,

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RTC v. GENE E. RICE, et al.
APPENDIX A

FILED: Jan 11, 1994

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

In re: Consolidated Pinnacle West Securities Litigation/Resolution Trust Corporation-MeraBank Litigation	Master File No. CIV 88-1830 PHX-PAR ORDER THIS DOCUMENT RELATES TO Resolution Trust Corporation v. Rice, et al. CIV91-0634 PHX PAR

The Resolution Trust Corporation ("RTC") in its corporate capacity, Pinnacle West Capital Corporation ("Pinnacle West"), and various individual defendants in the RTC Action[1] jointly

[1] Keith L. Turley, Dorothy Rae Turley, Henry B. Sargent, Jr., Claire

request that claims asserted by the RTC in that action against each of the RTC defendants and Mary Sandra Tiffany Leonard and Gloria Leonard (collectively, the "Settling RTC Defendants") be dismissed with prejudice and that the partial settlement of the RTC Action, pursuant to the terms of the Stipulation of Settlement dated as of November 24, 1993 (the "Stipulation") be approved. The joint motion further requests an

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Sargent, Pamela Grant, Daniel Cracchiolo, Donald N. Soldwedel, Lou Soldwedel, Maurice R. Tanner, Hazel H. Tanner, Douglas J. Wall, Mary A. Wall-Lambert, George E. Leonard, Jr., Peter C. Byrne, Beverly Byrne, Melvin L. Decker, Clarice O. Decker, Hayden C. Hayden, Catherine Hayden, Donald S. Johnson, Marian E. Johnson, Reginald T. Morrison, Catherine G. Morrison, Howard E. Kraft, Mary Ann Kraft, Gilberto I. Valdez, Gloria Ann Valdez, Dr. Morrison Warren, Margaret Warren, Jose Acosta, Aurora B. Acosta, Benjamin F. Williams, Daisy M. Williams, J. Darryl Lippincott, and Betty Jo Lippincott.

order barring Gene Rice, Lola Rice, Ernest Modzelewski, and Nancy Modzelewski (the "Nonsettling RTC Defendants") from pursuing claims for contribution and/or indemnity against the Settling Parties in the RTC Action, and also against nonparty settlor Pinnacle West.

The RTC filed a separate memorandum in support of the joint motion for good faith settlement determination requesting a pro tanto judgment offset rule such that the amount of any judgment the RTC may obtain against the Nonsettling RTC Defendants would be reduced by the amount of the settlement. Pinnacle West and the Settling RTC Defendants do not join in the RTC pro tanto request, but instead ask the court to adopt a proportionate judgment reduction rule.

The Nonsettling RTC Defendants filed a memorandum in opposition to the joint motion. They first argue that I should be disqualified from hearing the joint motion because of my role as settlement judge. They oppose the entry of any bar order, but if any order is entered, they specifically contend that the court should not adopt a pro tanto rule.

A hearing on the joint motion was held on December 29, 1993. Having considered argument and evidence submitted in support of, and in opposition to the Stipulation, and having considered other pleadings and papers relevant to the issues the Stipulation presents, the joint motion, and the RTC pro tanto memorandum, and good cause appearing therefor, I ruled from the

bench denying the Nonsettling RTC Defendants' request for disqualification, approving the Stipulation, granting the joint motion for a good faith settlement determination, and adopting a proportionate judgment reduction rule. An order to this effect has also been signed and entered. These findings and conclusions support the order.

FINDINGS OF FACT

1. Pursuant to orders entered by the district court in the Class Action, the Derivative Action, and the RTC Action, and to authorization by the Chief Judge of the Ninth Circuit, I was appointed as a district judge, sitting by designation in the District of Arizona, in December 1991, for the purpose of

directing settlement negotiations and coordinating settlement.

2. In that capacity I have participated in dozens of conferences having to do with the possibilities of structuring a settlement that would be satisfactory to all parties involved in each of the actions. The parties initially filed memoranda setting out their respective views and settlement positions. Those papers were exchanged among all parties. After that, I conferred on numerous occasions sometimes individually, sometimes in groups with counsel for each of the parties, and with counsel and representatives of the various insurers whose policies arguably were triggered by the claims asserted in each of the actions. During the course

of these extensive proceedings, I have naturally learned a great deal about the position of each party (and of the three insurers) on settlement. However, all of my knowledge about any of these actions has been obtained in the course of my duties as a district judge sitting by designation to assist in settlement. Nothing I know about these actions has come from an extrajudicial source.

3. If the settlement reflected in the Stipulation is not accomplished for any reason, I will not have anything further to do with any of the actions. Each will immediately be retransferred to the judge originally assigned for trial. Thus, my role has been and, in ruling on the pending motions, continues to be for settlement purposes only. I have not

had, and will not have, anything to do with determining the merits of any of the claims or defenses of any of the parties.

4. To disqualify the settlement judge in this case would impose a significant burden on the parties and the trial court. Each of the actions is complex, and the insurance coverage issues are extraordinarily complicated. Because neither Judge McNamee nor any other judicial officer has knowledge of the settlement negotiations, if a judge other than myself were required to decide the pending motions, the papers filed in support and in opposition would in all likelihood have been even more extensive, the new judge would have been required to familiarize himself with volumes of material relating to interrelated

actions, claims, and coverage issues, and I would undoubtedly have been requested to submit a declaration or recommended findings and conclusions with respect to the negotiations that led to the Stipulation. My knowledge of the settlement proceedings would therefore have become a part of the record for purposes of the good faith determination in any event.

5. As I have been fully informed on all aspects of the RTC's claims against the Nonsettling RTC Defendants and the Nonsettling RTC Defendants' claims against the RTC and possible claims over against other parties and nonparties, as well as the views of each side about defenses and the availability of insurance to cover potential

liability, I am in the best position to determine if the settlement process and the partial settlement reflected in the Stipulation have been in good faith.

6. The record reflects no statement that I have made or opinion I have expressed which reasonably could give rise to any impression of bias or lack of impartiality.

7. In the order transferring the RTC Action to implement the Stipulation, the trial judge ruled that there was no cause to disqualify me from implementing the settlement. No reason appears to rule to the contrary at this time.

8. As the record demonstrates, the Stipulation reflects a partial settlement

that was noncollusive. It was the product of vigorous, adversarial negotiations among the RTC, the Settling RTC Defendants, the Nonsettling RTC Defendants, Pinnacle West, and the insurers, which I helped to facilitate as a settlement judge.[2] The process was entirely arms-length. All parties were (and are) represented by extremely capable and experienced counsel, expert in regulatory matters.

9. In March 1993, after considerable and difficult discussions, the RTC's outside counsel expressed a willingness to recommend that the RTC settle with all the defendants in the RTC

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[2] The settlement process was likewise arms-length and in good faith with respect to the Class Action and Derivative Action.

Action for a payment of $25,000,000 and execution by those defendants of releases of all claims against the RTC related to Old MeraBank, including each of the Contested Compensation Actions and similar actions filed by Gene E. Rice and Ernest F. Modzelewski. Rice decided at that time not to settle with the RTC on those terms. In that connection, I met with Rice and his counsel to satisfy myself that Rice personally understood the potential costs and benefits. I find that Rice is a sophisticated businessman, ably represented, who has concluded after being fully informed and advised, that it is in his best interests to pursue his individual claim for affirmative relief against the RTC[3] and to forego settlement

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[3] At the time of Rice's decision the district court had entered summary judgment in the RTC's favor on Rice's

on any basis that would require him to relinquish that claim.

In April 1993, Modzelewski's counsel advised, in writing, that Modzelewski intended to dismiss his claim against the RTC with prejudice and thus participate in the settlement. However, on September 23, 1993, Modzelewski's counsel advised in writing that Modzelewski no longer wished to participate in the settlement on the terms to which he had previously agreed.

10. Throughout the settlement process, the Nonsettling RTC Defendants had the opportunity of participating fully in the negotiations. Their counsel

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affirmative claim for relief. That determination is now on appeal. As of this date no decision has been rendered.

attended settlement conferences and was kept informed of the progress of negotiations; in addition, counsel for the Nonsettling RTC Defendants and the RTC's outside counsel conferred separately and with me, as did the insurers, in an effort to develop a mutually acceptable, creative compromise. Even though these efforts failed, counsel for the Nonsettling RTC Defendants had the opportunity to review and respond to the settlement documents as they were being negotiated, drafted, and submitted for the court's approval.

11. The overall consideration received by the RTC in settlement is substantial, reasonable, and fair in light of the facts that (1) the RTC maintains that all its claims have merit,

including both the claims it has asserted in the RTC Action against the Settling RTC Defendants, and its potential claims for compensatory damages against Pinnacle West; (2) the Settling RTC Defendants deny each of the RTC's claims; (3) Pinnacle West denies each of the RTC's potential claims; (4) the payment of $25,000,000, plus accrued interest, to the RTC in partial settlement of the RTC Action represents an amount not less than the fair share of the aggregate common liability, if any, of the Settling RTC Defendants and Pinnacle West; (5) there are risks inherent in continued litigation; (6) there are substantial difficulties associated with applicable insurance coverage in light of the various coverage defenses asserted by the insurers; (7) continued litigation

subjects the parties to the possibility of dissipation or loss of assets; and (8) the Settling RTC Defendants and Pinnacle West should pay less in settlement than the claimed damages asserted by the RTC.

12. I have considered the release and dismissal of certain Contested Compensation Actions (as that term is defined in the Stipulation) against the RTC by Hayden C. Hayden, Howard Kraft, Donald S. Johnson, Reginald T. Morrison, Melvin L. Decker, and Peter C. Byrne (the "Contested Compensation Plaintiffs"). The Contested Compensation Plaintiffs assert that their claims have merit, and the RTC denies the allegations in each of the Contested Compensation Actions. As a condition of the release and dismissal of the RTC claims against them, the

Contested Compensation Plaintiffs release and dismiss the Contested Compensation Actions against the RTC.

13. I have also considered the $465,500,000 paid by Pinnacle West in March 1990 to the RTC as receiver for MeraBank, a Federal Savings Bank, pursuant to a settlement agreement with the Office of Thrift Supervision dated December 6, 1989, relating to MeraBank.

14. The settlement of the Contested Compensation Actions, the Class Action, and the Derivative Action, and the partial settlement of the RTC Action set forth in the Stipulation are inextricably interrelated. Pinnacle West has substantially facilitated and contributed to the settlement of these consolidated

actions by, among other things, funding the premium expense for the various directors' and officers' liability insurance policies, certain proceeds of which have, in addition to the further contribution by Pinnacle West of $5,750,000, fully funded the settlement of these three consolidated actions. The settlement of these consolidated actions, as set forth in the Stipulation, would not have occurred without Pinnacle West's contribution of $5,750,000 to the settlement or without Pinnacle West's authorization of the payment made by the insurers into the Derivative Settlement Fund pursuant to Paragraph 3.1 of the Stipulation, the proceeds of which will be used for, among other things, the full funding of the settlement with the RTC. In addition, in light of the progress of

settlement negotiations, Pinnacle West and the RTC entered into a tolling agreement whereby all claims the RTC would have asserted in a complaint against Pinnacle West, together with all defenses Pinnacle West would have asserted against the RTC, were preserved. Without this agreement, Pinnacle West would have been made a party to the RTC Action.

15. The Nonsettling RTC Defendants were offered an opportunity to participate in the settlement on the same terms as offered to, and accepted by, co-defendant Settling Parties who are essentially similarly situated. Each had asserted a compensation claim against the RTC; however, the Stipulation requires all the Contested Compensation Plaintiffs

to dismiss their Contested Compensation Actions against the RTC. Although Modzelewski originally agreed to these terms, he later decided to reject them. Rice, who declined to settle on the terms accepted by the Settling RTC Defendants from the outset, was subsequently offered the opportunity to settle on different terms which would have been more favorable than those offered to others. In September 1993, counsel for the RTC made a number of proposals increasing the amount of the receivership certificates the RTC was willing to issue to Rice in an effort to induce him to settle his claims. Rice continued to believe his claim for monetary compensation warranted a higher offer, and refused settlement on these terms. In later November and early December, the excess carrier offered to

fund settlement of the Rice and Modzelewski claims in exchange for a full release by the RTC of its claims. The RTC was unwilling to accept settlement on these terms.

16. There is no evidence that the settlement was ever structured so as to deprive the Nonsettling RTC Defendants of insurance coverage for the claims asserted by the RTC.[4] To the contrary, the record indicates that the objective throughout was to achieve a global settlement. Although that objective was ultimately not achieved because the Nonsettling RTC Defendants concluded that

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[4] The Declaration of Peter K. Rosen in support of the Nonsettling RTC Defendants' position is largely based on speculation and hearsay, and the conclusions drawn do not accord with the reality of the settlement process or the record.

their individual claims for affirmative relief against the RTC were worth more than the RTC was willing to give up, and the RTC concluded the opposite, at no time did any of the settling parties or their insurers indicate that their settlement position was in any way motivated by the possibility of exhausting insurance coverage of any Nonsettling RTC Defendants. Indeed, both the RTC and the Nonsettling RTC Defendants maintain that substantial coverage exists with respect to the RTC claims; the insurers, or course, disagree. So far as attorneys' fees and expenses are concerned, whatever dispute there may be does not arise from the Stipulation and is a matter to be resolved as between individual defendants and the carriers. In any event, the

record does not reflect that the Nonsettling RTC Defendants are situated any differently from the Settling RTC Defendants in this respect.

16. The creation of the Class Settlement Fund and the Derivative Settlement Fund was motivated by tax considerations, as well as the need to avoid direct payment to the RTC in light of the regulatory exclusions in some of the insurance policies. The insurers have agreed to advance sufficient funds necessary to effectuate the settlement, subject to an agreement among them to arbitrate at a later date issues related to applicable policy years and the exposure of each insurer. Consequently, as of this date, the precise extent to

which insurer will be held in liable for the settlement contributions is unknown.

17. There is no collusion, bad faith, fraud, or tortious conduct in entering into the Stipulation by any of the Settling Parties aimed at causing injury to the interests of the Nonsettling RTC Defendants or any person not a party to the Stipulation.

18. Any finding of fact inappropriately designated as a conclusion of law is incorporated herein.

CONCLUSIONS OF LAW

1. Under 28 U.S.C. § 455(a), a judge must disqualify himself in any proceeding in which his impartially might

reasonably be questioned. The test for impartiality is an objective one: The judge must disqualify himself "only when a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." United States v. Winston, 613 F.2d 221, 222 (9th Cir. 1980).

Under § 455(b), a judge is required to disqualify himself "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Disqualification is appropriate only when the information is derived from an extrajudicial source. Winston, 613 F.2d at 222.

"Settlement negotiations clearly are not an 'extrajudicial' source of information, and participation in settlement discussions does not require disqualification." United States v. Conservation Chem. Co., 106 F.R.D. 210, 234 (W.D. Mo. 1985). "If comments made by a court in the course of pretrial proceedings . . . were regarded as extra-judicial, the court's ability to promote the settlement of civil litigation would be crippled." Fong v. American Airlines, Inc., 431 F. Supp. 1334, 1338-39 (N.D. Cal. 1977).

Relying solely on In re MGM Grand Hotel Fire Litig., 570 F. Supp. 913 (D. Nev. 1983), the Nonsettling RTC Defendants contend that a judge who actively participates in settlement

negotiations should be disqualified from determining the good faith of the settlement. Nothing in MGM requires the judge to appoint a separate "settlement coordinator" to prevent disqualification, however. Indeed, "[i]t would be incomprehensible to suggest that a court be disqualified every time it explores settlement of a case which it is required to do under the Federal Rules." Id. at 926.

There are no grounds for disqualifications here. No extrajudicial information was received, and the Nonsettling RTC Defendants have shown no evidence of bias or prejudice. Nor is there any basis for concluding that a reasonable person with knowledge of the process would conclude that the judge's

impartiality might reasonably be questioned.

2. The Stipulation was arrived at by arms-length negotiations, all parties were assisted by experienced counsel, and it is a fair and reasonable resolution of the RTC Action. The settlement process was conducted in good faith by all concerned and the settlement reflected in the Stipulation is noncollusive. The consideration provided by Pinnacle West and the Settling RTC Defendants under the Stipulation is fair and reasonable and confers a substantial benefit on the RTC. In light of this benefit, as well as the substantial defenses to liability that the Settling RTC Defendants and Pinnacle West would assert to the RTC's claims, the uncertainty of insurance coverage for

the RTC Action other than in the context of the proposed settlement, and the absence of any collusion in negotiating and consummating the settlement, the agreement embodied in the Stipulation is neither too cheap a settlement, nor too expensive a settlement. It is therefore approved as having been entered into and made in good faith.

3. Based upon all of the relevant terms of the settlement, including the financial contributions made by or on behalf of the Settling RTC Defendants, and in light of the facts and circumstances underlying the RTC Action, each of the Settling RTC Defendants is entitled to protection against the expense and burden of further claims and litigation relating to the RTC Action as

provided in Paragraph 5 of the order entered December 29, 1993.[5]

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[5] It provides:

> 5. All claims, however denominated, regardless of the allegations of fact, law, theories, or the principles on which they are based, including all claims for contribution, reimbursement, equitable apportionment or indemnity (except claims based upon a specific written agreement of indemnity) arising under any federal or state law (whether common law or statutory), rule, regulation, or order in equity, that have been or could have been asserted against the Settling RTC Defendants, Mary C. Leonard, or Pinnacle West by the Nonsettling RTC Defendants or, to the extent legally permissible, by any other entity or person not a party to the RTC Action, which claims now exist or have accrued or in the future may exist or accrue, and which arise out of, are based on, or relate in any way to the subject matter of the RTC Action, are hereby extinguished, discharged, satisfied, dismissed with prejudice, and barred, and the future filing of such claims is

4. The Nonsettling RTC Defendants argue that regardless of whether their claims against the Settling RTC Defendants may be barred, the court cannot bar their claims for contribution and indemnity against Pinnacle West because it is not a party to the RTC Action. They rely on Employers Ins. v. Musick, Peeler & Garrett, 954 F.2d 575 (9th Cir. 1992), aff'd on other grounds, 113 S. Ct. 2085 (1993), FDIC v. Geldermann, Inc., 975 F.2d 695 (10th Cir. 1992), and In re NBW Commercial paper Litig., 807 F. Supp. 801 (D.D.C. 1992). None of these opinions precludes including Pinnacle West in the bar order in the circumstances of this case.

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hereby enjoined.

In Musick, Peeler & Garrett, the court held that "a settlement agreement cannot be relied upon to bar subsequent actions for contribution by settling defendants against individual who were not party to the original suit." 954 F.2d at 579 (emphasis added). The court reasoned that bar orders are intended to protect settling parties from being used by nonsettling parties, not to prevent settling parties from seeking contribution from others generally. Id.

In Geldermann, the FDIC sought an order barring the defendants from asserting claims of indemnity or contribution against certain nonparties with whom the FDIC had settled in unrelated litigation. 975 F.2d at 696. The Tenth Circuit held that because the

FDIC was not the real party in interest to request the bar order, Fed. R. Civ. P. 17(a) prevented the court from addressing the FDIC's request. Id. at 697. Whereas the nonsettling parties in Geldermann were not before the court in any sense, here Pinnacle West was fully involved and it -- not the RTC -- is seeking a bar order for itself.

Finally, NBW is distinguishable because the proposed settlement contained a provision requiring the adoption of a pro tanto judgment offset rule, and because the nonsettling defendant in that case was the FDIC. 807 F. Supp. at 806. It is clear that the court's refusal to approve the settlement rested in large part on both of these factors. See id. at 806-10. Had the settlors in NBW

agreed to a proportionate offset rule, such as the one I adopt in the present case, the court would have likely approved the settlement and granted the bar order.

A bar order in the instant case will protect the Settling Parties. Although Pinnacle West is not a defendant in the RTC Action, the RTC has indicated that it would pursue claims against Pinnacle West and both its claims and Pinnacle West's defenses are subject to a tolling agreement. Pinnacle West is a critical party to the overall settlement of the consolidated actions. Moreover, Pinnacle West has contributed substantial value to the overall settlement, without which the partial settlement in the RTC Action could not have occurred. Under these

circumstances, I conclude that the bar order should also apply to any subsequent claims against Pinnacle West.

5. The Nonsettling RTC defendants also contend that even if claims for contribution may be subject to a bar order, and even if Pinnacle West may be included despite being a nonparty to the RTC Action, indemnity is different and their claims for indemnification should not be barred. They rely principally on Donovan v. Robbins, 752 F.2d 1170, 1178 (7th Cir. 1984), and NBW, 807 F. Supp. at 811, both of which distinguish claims for contribution from claims for indemnity.

As the Eleventh Circuit recently noted in In re U.S. Oil & Gas Litig., 967 F.2d 489, 495 (11th Cir. 1992), however,

a number of federal courts have approved settlement bars against indemnity claims. See, e.g., In re Jiffy Lube Sec. Litig., 927 F.2d 155, 158 (4th Cir. 1991); Frankin v. Kaypro Corp., 884 F.2d 1222, 1225 & n.2 (9th Cir. 1989), cert. denied sub nom. Franklin v. Peat Marwick Main & Co., 498 U.S. 890 (1990); Dalton v. Alston & Bird, 741 F. Supp. 157, 161 (S.D. Ill. 1990). In addition, the Second Circuit recently stated that "[w]here a defendant seeks indemnity based on differences in fault, we see no reason why a court-approved settlement bar should have a different effect on that right than it would have on contribution." In re Masters Mates & Pilots Pension Plan & IRAP Litig., 957 F.2d 1020, 1032 (2d Cir. 1992).

I also note that the bar order I have signed does not apply to any contractual claims for indemnity that the Nonsettling RTC Defendants may have. Under the present circumstances, I conclude that it is appropriate to bar all other indemnity claims.

6. In connection with the bar order sought by the Settling Parties, the RTC urges that a pro tanto judgment offset rule should be adopted. A pro tanto bar order would reduce any judgment obtained by the RTC against the Nonsettling RTC Defendants by the amount of the settlement. Both the Settling and the Nonsettling RTC Defendants seek a comparative fault judgment rule, which would limit the liability of the

Nonsettling RTC Defendants to their proportionate share of fault.

Federal law governs the determination of the rights of the RTC in the present action. See 12 U.S.C. § 1441(1)(1); RTC v. Gallagher, 815 F. Supp. 1107, 1109 (N.D. Ill. 1993); cf. FDIC v. New Hampshire Ins. Co., 953 F.2d 478, 481 (9th Cir. 1991) (interpreting similar language in parallel jurisdictional provision governing FDIC). Because 12 U.S.C. § 1821(k), the applicable federal statute, does not prescribe a settlement bar rule, this Court may, as a matter of federal common law, either adopt the prevailing state statute as the federal rule of decision or alternatively, fashion a uniform federal rule. United States v. Kimbell

Foods, Inc., 440 U.S. 715, 728 (1979). It is not necessary to resolve that question here, because the proportionate judgment rule I shall adopt is consistent with both.[6]

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[6] See, e.g., Kaypro, 884 F.2d at 1231 (adopting proportionate rule in context of partial settlement of securities class action). In Kaypro, the court found that the proportionate offset method satisfies the goals of deterrence, equity, and encouragement of settlements. Id.

Arizona has abolished joint and several liability in favor of a comparative fault system, subject to certain exceptions that do not appear applicable here. Ariz. Rev. Stat. § 12-2506(A). Although the RTC argues that under § 12-2504(1), a pro tanto rule is appropriate, this section does not apply if joint and several liability is unavailable. See Rowland v. Bernstein, 171 Ariz. 96, 97-98, 828 P.2d 1237, 1238-39 (Ct. App. 1991) (§ 12-2504 has no effect on rule of several liability under § 12-2506).

The RTC offers two principal arguments in favor of a uniform federal pro tanto rule: (1) the compelling federal interest in allowing full recovery by the RTC for the taxpayers; and (2) the need to encourage settlement and reduce litigation costs. While it may be true that a pro tanto rule is appropriate in some RTC cases, neither of these rationales is persuasive given the unique facts of this particular case. First, through its earlier settlement with Pinnacle West, the RTC in its receivership capacity has already recovered $465.5 million. This, in addition to the $25 million it will receive under the terms of the Stipulation, indicates that the taxpayers' interests have been well served already.

Second, the settlement was accomplished and the Stipulation entered into without reference to an offset rule. Thus, a pro tanto rule can have no incentive effect in this case. Further, the type of offset rule is more likely to affect the RTC's incentive to settle in those situations where the defendants are different entities with different sources of funds from which the RTC can satisfy its claims. For example, many cases will involve one or more accounting firms, law firms, and individual officers and directors who are separately insured. In such cases, a pro tanto rule may encourage settlement because as a practical matter, the RTC will be able to collect more money from some defendants than from others. By contract, all of the individual defendants in this case

are identically situated in that their primary source of funds is the same group of insurance policies. If there are any exclusions to coverage, they apply to all the RTC defendants. And because the Nonsettling RTC Defendants lack any significant assets to cover a subsequent judgment against them, the RTC will not collect any more or less from them than it could collect from the Settling RTC Defendants. Under these circumstances, the RTC's argument based on incentive lacks substantial force.

Finally, a proportionate judgment rule squares more closely with he RTC's theory of the case against the Settling and Nonsettling Defendants. Because the RTC alleges mismanagement of particular loan portfolios, the Nonsettling RTC

Defendants' liability is appropriately limited to their relative culpability. Accordingly, based on the particular circumstances in this case, I conclude that the proportionate judgment rule is the proper offset rule to adopt.

7. As the Nonsettling RTC Defendants concede, the use of a proportionate judgment offset rule obviates the need for an extensive hearing on the fairness of the settlement. In essence, the Nonsettling RTC Defendants are left in the same position they would have been in if the other parties had not settled.

8. The partial settlement set out in the Stipulation constitutes a good faith settlement. Under the "tortious

conduct" standard, all settlements are presumed fair and in good faith unless there is evidence of collusion or other tortious conduct. City of Tucson v. Superior Court, 161 Ariz. 441, 444, 778 P.2d 1337, 1340 (Ct. App. 1989), aff'd, 165 Ariz. 236, 798 P.2d 374 (1990).[7] The Stipulation is not collusive or in bad faith. The negotiations were lengthy, hard-fought, and conducted under this court's supervision. All parties, including the Nonsettling RTC Defendants, were ably represented by competent counsel.

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[7] Because I do not adopt the pro tanto judgment offset method, it is unnecessary to decide whether the settlement meets the more stringent "reasonable range" test that some states have adopted. See, e.g., Tech-Bilt, Inc. v. Woodward-Cycle & Assocs., 38 Cal. 3d 488, 499, 698 P.2d 159, 166-67, 213 Cal. Rptr. 256, 263 (1985).

There is no basis for the Nonsettling RTC Defendants' contention that the Stipulation was intended to injure their interests. To the contrary, they will benefit from the settlement. In particular, Rice, at no personal expense, is being dismissed from the Class and Derivative Actions for which he is personally liable for substantial damages, including claims that were asserted solely against him in the Derivative Action for alleged securities fraud in connection with his sale of MeraBank stock.

The consideration provided by Pinnacle West and the Settling RTC Defendants under the Stipulation confers a substantial benefit on the RTC. In light of this benefit, as well as the

substantial defenses to liability that the Settling RTC Defendants and Pinnacle West would assert to the RTC's claims, the uncertainty of insurance coverage for the RTC action other than in the context of the proposed settlement, and the absence of any collusion in negotiating and consummating the settlement, the agreement embodied in the Stipulation is in good faith.

9. Any conclusion of law inappropriately designated as a finding of fact is incorporated herein.

DATED: January 7, 1994

/s/ Pamela Ann Rymer

Pamela Ann Rymer
United States Circuit Judge

(sitting by designation)

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RTC v. GENE E. RICE, et al.
APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: Consolidated Pinnacle West Securities Litigation/ Resolution Trust Corporation-Merabank Litigation.	
RESOLUTION TRUST CORPORATION, et al., Plaintiffs-Appellees, v. GENE E. RICE, LOLA RICE, ERNEST F. MODZELEWSKI, NANCY MODZELEWSKI, Defendants-Appellants.	No. 94-15431 D.C. No. CV-88-01830-PAR OPINION

Appeal from the United States District Court for the District of Arizona
Pamela Ann Rymer,
Circuit Judge, Presiding

Argued and Submitted
November 16, 1994--San Francisco, California

Filed March 23, 1995

Before Donald P. Lay,* Harry Pregerson, and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Lay

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* Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

SUMMARY

Banking/FDIC and FSLIC/Civil Litigation Procedure

The court of appeals affirmed a district court judgment. The court held that a settlement agreement that encompassed the Resolution Trust Corp.'s suit against many of a failed bank's former officers and directors and a number of interrelated actions arising out of the bank's failure, did not unfairly prejudice two of the bank's highest ranking officers.

Appellee the Resolution Trust Corp. (RTC), which had become the receiver for Merabank, sued many of MeraBank's former directors and officers. Interrelated

actions arising out of MeraBank's failure also were brought in the form of two shareholders' class actions, a derivative suit, and directors' and officers' contested compensation suits.

Over 40 parties agreed to join in a settlement, including a class of shareholders, a group of derivative plaintiffs, Pinnacle West Capital Corp., several of Merabank's former officers and directors, two directors' and officers' liability insurers and the RTC. The settling officers and directors of Merabank gave up their contested compensation claims against the RTC in exchange for releases from all personal liability, including contributing to the settlement fund.

The district court approved the settlement agreement, finding that it was arrived at in good faith and was a fair and reasonable resolution of the RTC and consolidated actions. As part of its final judgment, the court barred appellants Gene Rice, Lola Rice, Ernest Modzelewski and Nancy Modzelewski (collectively, the Nonsettlors) from asserting certain contribution and indemnity claims against the settling defendants. However, the court also adopted a comparative fault offset rule, limited the potential liability of the Nonsettlors to their proportionate share of fault.

The Nonsettlors appealed, claiming that the settlement unfairly prejudiced them, violated their due process rights

and inappropriately barred a number of their claims against the settling parties.

[1] Nothing in the record indicated the district court abused its discretion in finding the settling parties reached their agreement in good faith. There was no evidence that the settling parties singled out the Nonsettlors for disparate treatment. Although Mr. Rice and Mr. Modzelewski were among the highest ranking officers at Merabank and the compensation claims they were asked to give up were potentially more valuable than those of the settling officers and directors, the worth of the claims was at best speculative. [2] Moreover, because the district court ultimately adopted a proportionate judgment rule, the

Nonsettlors were not prejudiced. There was no reason to upset the district court's conclusion that the settlement process and result were fair.

[3] The district court did not abuse its discretion in finding nonparty Pinnacle West to be a critical participant and contributor to the overall settlement, and thereby applying the bar order to subsequent non-contractual claims against it. Furthermore, the district court was correct in rejecting the proposition that settlement bars are effective against contribution claims but not against claims for indemnity. Thus, the district court did not abuse its discretion in barring the Nonsettlors' contribution and

non-contractual indemnity claims against the settling parties.

COUNSEL

Peter K. Rosen, Rosen Law Firm, Los Angeles, California, for the defendants-appellants.

Katherine M. Harmeyer, Snell & Wilmer, Phoenix, Arizona; W. Scott Bales, Meyer, Hendricks, Victor, Osborn & Maledon, Phoenix, Arizona; Eugene J. Comey, Comey, Boyd & Luskin, Washington, D.C.; Howard N. Cayne, Arnold & Porter, Washington, D.C., for the plaintiffs-appellees.

OPINION

LAY, Circuit Judge:

Gene Rice, Lola Rice, Ernest Modzelewski, and Nancy Modzelewski ("the Nonsettlors") appeal the district court's approval of the partial settlement of a Resolution Trust Corporation ("RTC") lawsuit against many of Merabank's former directors and officers.[1] In addition to the RTC's suit, the settlement encompassed a number of interrelated actions arising out of the failure of Merabank, after which the RTC became receiver. These included two shareholders' class actions, a derivative suit, and directors' and officers' contested compensation suits. Ultimately, over forty parties agreed to join the settlement, including a class of

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[1]Honorable Pamela Ann Rymer, United States Circuit Judge for the Ninth Circuit, sitting by special designation.

shareholders, a group of derivative plaintiffs, Pinnacle West Capital Corporation (which had previously acquired Merabank), several of Merabank's former officers and directors, two directors' and officers' liability insurance companies ("D & O insurers"), and the RTC.[2] The settling officers and directors of Merabank gave up their contested compensation claims against the RTC in exchange for releases from all

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[2]The aggregate amount of the settlement totaled $61,625,000. This amount reflects a full settlement of the class and derivative actions, and a partial settlement of the RTC action. Pinnacle West paid $5,750,000 to the class settlement fund, and the D & O insurers contributed $55,875,000 to the overall settlement. Of the latter amount, approximately half was deposited in the class settlement fund and half went to the derivative settlement fund. The settlement further provided that $25 million of the derivative fund would be paid to the RTC.

personal liability, including contributing to the settlement fund.

In approving the settlement agreement, the district court found that it was arrived at in good faith and was a fair and reasonable resolution of the RTC and consolidated actions. *See In re Consolidated Pinnacle West Sec. Litig.*, No. CIV 88-1830, slip op. at 13, 21 (D. Ariz. Jan. 11, 1994). As part of its final judgment, the court barred the Nonsettlors from asserting certain contribution and indemnity claims against the settling defendants, but also adopted a comparative fault offset rule, limiting the potential liability of the Nonsettlors to their proportionate share

of fault.[3] *Id.* at 19. The Nonsettlors now appeal, claiming the settlement unfairly prejudiced them, violated their due process rights, and inappropriately barred a number of their claims against the settling parties. We affirm.

[1] Although this case involves a complex web of parties and lawsuits, we find the analysis is relatively straightforward. First, we reject the Nonsettlors' claim that the settlement

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[3]After entry of this judgment, the only surviving claims were the RTC's action against the Nonsettlors, Rice's and Modzelewski's compensation claims against the RTC, and any contractual indemnity claims the Nonsettlors may have. In 1994, this Court ruled that Modzelewski had no claim for compensation against the RTC because his rights in the deferred compensation had not vested before the RTC took over Merabank. *See Modzelewski v. RTC*, 14 F.3d 1374, 1378 (9th Cir. 1994). Thus, Rice has the only compensation claim that survives today.

was not reached in good faith and unfairly prejudiced them. We see nothing in the record that indicates the district court abused its discretion in finding the settling parties reached their agreement in good faith. There is no evidence that the settling parties singled out the Nonsettlors for disparate treatment: While the compensation claims Rice and Modzelewski were asked to give up potentially more valuable than those of the settling officers and directors, the worth of the claims was at best speculative.[4] In fact, because Rice and

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[4]Rice sought over $4,000,000 in his contested compensation claim, and Modzelewski sued for approximately $2,000,000. They allege that the settling officers' and directors' claims were for only $180,000 to $652,000. This Court's previous holding that Modzelewski has no claim for compensation because his rights did not vest illustrates the speculative nature of the allegations. *See Modzelewski*, 14 F.3d at 1378. Thus,

Modzelewski were among the highest ranking officers at Merabank, and therefore potentially subject to the greatest liability, they may have benefited more from the settlement than their settling counterparts, had they chosen to participate.[5] Thus, the

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merely because Rice and Modzelewski were asked to give up claims that alleged greater damages -- in exchange for a release from personal liability -- does not mean they were treated unfairly or differently than the settling directors and officers.

[5]Furthermore, the Nonsettlors are currently benefitting from the settlement agreement. For example, the district court concluded:

> Rice, at no personal expense, is being dismissed from the Class and Derivative Actions for which he is personally liable for substantial damages, including claims that were asserted *solely against him* in the Derivative Action for alleged securities fraud in connection with his sale of MeraBank stock.

Nonsettlors have not established that they were treated differently or worse than the settling officers and directors during the negotiations.

[2] Moreover, because the district court ultimately adopted a proportionate judgment rule, the Nonsettlors were not prejudiced. As the district court found, the Nonsettlors "are left in the same position they would have been in if the other parties had not settled." *In re Consolidated Pinnacle West Sec. Litig.*, No. CIV 88-1830, slip op. at 20. Because of the absence of prejudice or any evidence of collusion or other tortious conduct, we reject the Nonsettlors' contention that the court should have

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In re Consolidated West Sec. Litig., No. CIV 88-1830, slip op. at 20 (emphasis added).

undertaken a more stringent analysis of the good-faith issue.[6] We see no reason

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[6]In addition, contrary to the Nonsettlors' contention, the district court did not limit its good-faith analysis solely to whether there was collusion between the settling parties. The court made factual findings that the Non-settlors were "offered an opportunity to participate in the settlement on the same terms as offered to, and accepted by, [the settling parties] who are essentially similarly situated"; there was no evidence the agreement was structured to deprive the Nonsettlors of insurance coverage; the "objective throughout was to achieve a global settlement"; and there was no collusion, bad faith, or tortious conduct in reaching the settlement agreement. *In re Consolidated Pinnacle West Sec. Litig.*, No. CIV 88-1830, slip op. at 9-11. The court then evaluated the circumstances surrounding the settlement, and in particular the compromises struck by the RTC, and determined the settlement had been reached and made in good faith. The court concluded:

> The Stipulation was arrived at by arms- length negotiations, all parties were assisted by experienced counsel, and it is a fair and reasonable resolution of the RTC Action. The settlement process was conducted in good faith by all

to upset the court's conclusion that the settlement process and result were fair.

Second, the Nonsettlors' due process (and FIRREA) argument is without merit. The Nonsettlors were not prejudiced by the settlement, and therefore the RTC did not unfairly penalize them or deprive them of a property or liberty interest.

[3] Finally, we reject the Nonsettlors' challenges to the district court's bar order. The district court did not abuse its discretion in finding nonparty Pinnacle West to be a critical participant and contributor to the overall settlement, and thereby applying

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> concerned *and* the settlement reflected in the Stipulation is noncollusive.

Id. at 13 (emphasis added).

the bar order to subsequent non-contractual claims against it. For this reason, and because the court applied a proportionate rather than pro tanto offset rule, we agree with the court's conclusion that the cases cited by the Nonsettlors concerning nonparties and bar orders are distinguishable. *See In re Consolidated Pinnacle West Sec. Litig.*, No. CIV 88-1830, slip op. at 14-16 (distinguishing cases). Furthermore, we concur with the district court and a number of federal courts that have rejected the proposition that settlement bars are effective against contribution claims but not against claims for indemnity. *See id.* at 16-17; *see also In re U.S. Oil and Gas Litig.*, 967 F.2d 489, 495 (4th Cir. 1992) (finding "not a shred of logic upon which we could base a

principled distinction between bar orders against contribution, on the one hand, and orders against indemnity . . . on the other," and listing other courts that have approved bar orders for indemnity claims). Thus, we find the district court did not abuse its discretion in barring the Nonsettlors' contribution and non-contractual indemnity claims against the settling parties.

For the foregoing reasons, we AFFIRM.

RTC v. GENE E. RICE, et al.
APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED: June 5, 1995

In re: Consolidated Pinnacle West Securities Litigation/Resolution Trust Corporation-Merabank Litigation	No. 94-15431 D.C. No. CV-88-01830-PAR
RESOLUTION TRUST CORPORATION, Plaintiff-Appellee, vs. GENE E. RICE, LOLA RICE, ERNEST F. MODZELEWSKI, NANCY MODZELEWSKI, Defendants-Appellants.	O R D E R

Before: LAY,* PREGERSON, and
O'SCANNLAIN, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Pregerson and O'Scannlain voted to reject the suggestion for rehearing en banc and Judge Lay would so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge of the court has requested a vote on it. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Donald P. Lay, Senior Circuit Judge for the Eight Circuit, sitting by designation.